

Supreme Court, U. S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-761

CLAUDE D. BALLEW,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

**BRIEF OF RESPONDENT IN OPPOSITION TO
THE PETITION FOR WRIT OF CERTIORARI**

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PART ONE

Respondent urges that the Petition For Writ of Certiorari be denied, for the reasons herein given.

OPINION BELOW

The decision sought to be reviewed by this court is reported at 138 Ga. App. 530 (227 S.E. 2d 65), and a copy thereof is attached to the Petitioner's Petition as Appendix "A."

JURISDICTION

The jurisdiction of the court is conceded.

QUESTIONS PRESENTED

1. Whether a jury of five persons is constitutionally adequate under the provisions of the Sixth and Fourteenth Amendments of the Constitution of the United States.

2. Whether jury instructions on scienter that required the State to prove beyond a reasonable doubt that the accused had knowledge, either actual or constructive, and that constructive knowledge consists of knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material, are sufficient to meet constitutional minimum standards.

3. Whether the motion picture film "Behind the Green Door" is obscene and is therefore not protected expression under the First and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

On November 9, 1973, two Investigators for the Office of the Solicitor General for the Criminal Court of Fulton County went to the Paris Art Theatre located in Fulton County, Georgia. Both Investigators were experienced in the criminal prosecution of obscene materials. After paying a consideration they entered the theatre and viewed a motion picture film entitled "Behind the Green Door." The film was advertised on the marquee. After viewing the film, the Investigators obtained a search warrant. The warrant was served on the 9th day of November and the film was seized as evidence after it had been viewed again to make sure it was the same film.

The appellant and a Mr. Pace, who is not a party

here, were present at the theatre both at the time of the first viewing and at the time of the execution of the search warrant. The Investigators bought a ticket from Mr. Pace and the appellant, standing with Mr. Pace behind the cash register, pushed the button to unlock the door into the theatre proper. At the time the warrant was served, Mr. Pace was at the cash register and appellant was in the projection room. Both parties were arrested and appellant checked the cash register and locked the door to the theatre. A commitment hearing was waived as to this arrest on November 26, 1973.

On November 26, 1973, after the waiver of the commitment hearing, the same Investigators went by the Paris Adult Theatre to see if the same film was playing. "Behind the Green Door" was still on the marquee and the film was still showing. The film showing on November 26th was identical to the film shown on November 9th.

The Investigators then entered the theatre to view the film and the appellant and Mr. Pace were again present. When the Investigators tried to buy a ticket from Mr. Pace, he asked appellant to take the money. Appellant told Mr. Pace to accept because "You're the cashier." But Mr. Pace protested and stated "But you're the manager," or "You run the place." The appellant finally took the money. After viewing the film the Investigators obtained another search warrant, and this search warrant was executed on November 27th and again the appellant and Mr. Pace were present. Both appellant and Mr. Pace were arrested for the second time and appellant again locked the theatre. A two count accusation was filed alleging a violation of Ga. Code Ann. 26-2101 on two specified dates, the dates being essential averments to the transactions.

Trial was begun on May 22, 1975 and the jury returned a verdict of guilty. A motion for new trial was filed, and after being heard was overruled on September 29, 1975. Thereafter, the conviction was affirmed by the Court of Appeals of Georgia and the Supreme Court of Georgia denied certiorari.

PART TWO

ARGUMENT AND CITATION OF AUTHORITY

THE INSTANT CASE DOES NOT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT, NOR DECIDE SUBSTANTIAL FEDERAL QUESTIONS OF NATIONWIDE IMPORT.

1. A Jury of Five Persons is Constitutionally Adequate Under the Sixth and Fourteenth Amendments of the Constitution of the United States.

Petitioner was tried by a jury of five persons. Under the statute creating the Criminal Court of Fulton County, juries are composed of five persons stricken from a panel of twelve and the defendant is entitled to four preemptory strikes and the State three. The defendant gets first and last preemptory strikes. Ga. Laws 1890-1891, p. 935, as amended. The court was created in 1891 and why the number of jurors was fixed at five is not known. The Criminal Court of Fulton County is a court of limited jurisdiction and may only try misdemeanors, Ga. Laws 1890-1891, p. 935, as amended. It is the only Georgia court of misdemeanor jurisdiction with a five man jury. Jury verdicts in the Criminal Court of Fulton County must be unanimous as they must be in all Georgia Courts. *Ball v. Ga.*, 9 Ga. App. 162, 20 S.E. 888 (1911).

The five man jury has been upheld in Georgia. *McIntyre v. Ga.*, 190 Ga. 872, 11 S.E. 624 (1940), *Willis v. Ga.*, 122 Ga. App. 776 (1970).

The five man jury comports with this Court's decision in *Williams v. Florida*, 399 U.S. 78 (1970). In that case, this Court held a six man jury was constitutionally adequate in State trials under the Sixth and Fourteenth Amendments. This Court said:

"The purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government. 'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' *Duncan v. Louisiana*, supra, 391 U.S., at 156, 88 S. Ct. at 1451. Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—*particularly if the requirement of unanimity is retained*. And, certainly the reliability of the jury as a fact-finder hardly seems likely to be a function of its size.

It might be suggested that the 12-man jury gives

a defendant a greater advantage since he has more 'chances' of finding a juror who will insist on acquittal and thus prevent conviction. But the advantage might just as easily belong to the State, which also needs only one juror out of twelve insisting on guilt to prevent acquittal." (Emphasis supplied) *Williams v. Florida*, 399 U.S. 78, 103, 104 (1970).

In the instant case, the defendant was entitled to a unanimous verdict and an extra preemptory strike.

It is clear from the *Williams* case that mere size is not the controlling factor in the Sixth Amendment right to a jury trial. One important factor is the insulation provided by a lay body standing between the government and the defendant. See *Baldwin v. New York*, 399 U.S. 66 (1970); *Torres v. Delgado*, 391 F. Supp. 379 (D.C.P.R. 1974), affirmed 510 F.2d 1182 (1st Cir. 1975).

The Petitioner has not complained that an arbitrary exclusion of a particular class has taken place. *Williams v. Florida*, 399 U.S. 78 (1970).

Petitioner argues that a lesser number than 12 or six denies a cross section—however, this Court said in *Williams*:

"... the concern that the cross section will be diminished if the jury is decreased in size from 12 to six seems an unrealistic one." *Williams v. Florida*, 399 U.S. 104 (1970).

As one commentator has said (speaking of civil cases),

"Because the members of the five man jury represent a cross section unit of the community, they will continue to bring into the courtroom the diversity of viewpoint, the objectivity of detachment, the non-professional sense of values, and the spirit

of justice and fairness unhampered by precedent, which are the foundations of the jury system as we respect it. Moreover, all of the historic values placed upon the jury as a 'casual tribunal' attach readily to the five-member jury as it actually functions in the jury box; human virtues—and shortcomings—are fully present whether there are twelve or five jurors." *THE FIVE-MAN CIVIL JURY* 51 Geo. L.R. 120, 137 (1962).

This court has not decided what the minimal number of jurors may be under the Sixth Amendment; however, in *Williams* this Court hinted in a footnote that six is above the minimum:

"We have no occasion in this case (*Williams*) to determine what minimum number can still constitute 'a jury,' but we do not doubt that six is above that minimum" (Emphasis supplied), *Williams v. Florida*, 399 U.S. 78, 92 N. 28.

In *Johnson v. Louisiana*, 406 U.S. 356 (1971) this Court went further and considered the jury system of Louisiana.

"Louisiana has permitted less serious crimes to be tried by five jurors with unanimous verdicts, more serious crimes have required the assent of nine of 12 jurors, and for the most serious crimes a unanimous verdict of 12 jurors is stipulated. In appellant's case, nine jurors rather than five or 12 were required for a verdict. We discern nothing invidious in this classification. We have held that the States are free under the Federal Constitution to try defendants with juries of less than 12 men. *Williams v. Florida*, 399 U.S. 78 (1970).

... As to the crimes triable by a five-man jury, if appellant's position is that it is easier to convince nine of 12 jurors than to convince all of five, he is simply challenging the judgment of the Louisiana

Legislature. That body obviously intended to vary the difficulty of proving guilt with the gravity of the offense and the severity of the punishment. We remain unconvinced by anything appellant has presented that this legislative judgment was defective in any constitutional sense." *Johnson v. Louisiana*, 406 U.S. 356, 364, 365 (1971).

It is clear that Sixth Amendment requires a jury trial in any case other than a "petty offense," *Baldwin v. New York*, 399 U.S. 66 (1970), but it is also clear that the number of jurors is constitutionally irrelevant as long as it is enough to carry out the jury's historical function and five jurors is adequate for that purpose.

2. Jury Instructions on Scienter That Required the State to Prove Beyond a Reasonable Doubt That the Accused Had Knowledge, Either Actual or Constructive, and That Constructive Knowledge is Knowledge of Facts Which Would Put a Reasonable Man on Notice as to the Suspect Nature of the Material, Are Sufficient to Meet Constitutional Minimum Standards.

Section 26-2101 of the Criminal Code of Georgia provides, in part, as follows:

"(a) a person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word 'knowingly,' as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. . . ."

The Georgia statute, 26-2101 supra, is very similar and compares to New York statutes dealt with by the Court in *Mishkin v. New York*, 383 U.S. 502 (1966) and *Ginsberg v. New York*, 390 U.S. 629 (1968).

The *Mishkin* case pointed out that the New York Court of Appeals had construed Section 1141 of the New York Penal Law to require the "vital element of scienter," and it defined the required mental element in these terms:

"a reading of the statute (§ 1141) as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised. . . ."

Section 26-2101 of the Georgia Code requires "knowledge of facts which would put a reasonable and prudent person on notice," while Section 1141 of the New York Penal Law requires the accused to be "in some manner aware."

The statute dealt with in *Ginsberg* defined knowingly as "knowledge" of, or "reason to know" of, the character and content of the material.

Neither *Mishkin* nor *Ginsberg* requires actual knowledge as contended by the Petitioner herein. Both cases were reviewed and followed in *Hamling v. United States*, 418 U.S. 87 (1974), where the Court construed 18 U.S.C. § 1461, and held:

"To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U.S.C. § 1461 nor

by the Constitution."

In the instant case, the Petitioner was arrested on two separate occasions for showing the same motion picture film. Suffice it to say that he had actual notice and knowledge of the nature of the film without any doubt on the second occasion, and therefore the charge given the jury on constructive knowledge, even if error, was harmless to the Petitioner.

3. The Motion Picture Film "Behind the Green Door" is Obscene and is Therefore Not Protected Expression Under the First and Fourteenth Amendments of the United States Constitution.

The trial jury, after receiving proper charges as to the law involved, applied the law and returned its verdict finding the motion picture film "Behind the Green Door" obscene.

In its opinion on review of this case, the Court of Appeals of Georgia wrote:

"Our duty to uphold the constitutional guarantees is no less than that of the justices of the respective Supreme Courts of the United States and of this State, and although we abhor even the suggestion of censorship we nevertheless viewed an exhibition of this film in its entirety. . . .

The film, considered as a whole, and applying contemporary community standards, predominantly appeals to the prurient interest. It is without redeeming social value, and it is a shameful and morbid exhibition of nudity with particular and all-encompassing emphasis on sexual acts. It goes substantially beyond customary limits of candor in representing and portraying nudity and sex. The film presents patently offensive exhibitions and representations of ultimate sexual acts and manip-

ulations, normal and perverted. It shows unabashedly offensive and lewd views of the genitals of both male and female participants, and is replete with portrayals of individual and group acts of masturbation, cunnilingus, fellatio and sexual intercourse. It is degrading to sex. Except for the opening and a few other scenes toward the conclusion, it is rank, hard core pornography, and each exhibition in the theatre was 'a public portrayal of hard core sexual conduct for its own sake, and (presumably) for the ensuing commercial gain.' *Miller v. California*, 413 U.S. 15, 35, supra. The film 'Behind the Green Door' is obscene as a matter of constitutional law and fact, and is unprotected by the First and Fourteenth Amendments". . . . *Ballew v. The State*, 138 Ga. App. 530.

Petitioner cites a long line of cases in support of his contention that this Court should make an independent review and determination of obscenity vel non. It appears to be his contention that this Court should make an independent review and determination of obscenity vel non on all materials brought into question in the State Courts. With the exception of *Jenkins v. Georgia*, 418 U.S. 153 (1974), all the cases cited by the Petitioner were decided during the period between *Roth v. United States*, 354 U.S. 476 (1957) and *Miller v. California*, 413 U.S. 15 (1973); a period when no majority of the Court could agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power, and at which time convictions were reversed by this Court summarily.

"Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine

what constitutes obscene, pornographic material subject to regulation under the States' police power. See, e.g., *Redrup v. New York*, 386 U.S. at 770-771, 87 S. Ct. at 1415-1416. We have seen 'a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.' *Interstate Circuit, Inc. v. Dallas*, 390 U.S., at 704-705, 88 S. Ct. at 1314 (Harlan, J., concurring and dissenting)." . . . *Miller v. California*, 413 U.S. 15, 22, 88 S. Ct. 2607, 2614.

"In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. *Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L. Ed. 2d 515 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup* 'policy.' See *Walker v. Ohio*, 398 U.S. 434-435, 90 S. Ct. 1884, 26 L. Ed. 2d 385 (1970) (dissenting opinions of Burger, C. J., and Harlan, J.). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us." *Miller v. California*, 413 U.S. 15, 88 S. Ct. 2607, 2614 (Footnote 3).

In *Jenkins v. Georgia*, supra, the film "Carnal Knowledge" was in question and the scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. Such is not the case in the film "Behind the Green Door" where, not only does the camera focus on the bodies of the "actors" while engaged in "ultimate sexual acts," but it shows offensive and lewd views of the genitals of both

male and female participants. See the opinion of the Court of Appeals of Georgia, Petitioner's Petition, Appendix "A," at page A. 4.

The motion picture film "Behind the Green Door" is hard-core pornography at its worst and its showing by the Petitioner on both occasions for which he was convicted was "calculated purveyance of filth."

CONCLUSION

For all the foregoing reasons, Respondent urges this Court to decline to issue the Writ of Certiorari in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have this day deposited in the United States Mail three (3) copies of the foregoing Brief of Respondent in Opposition to the Petition for Writ of Certiorari with first class postage prepaid, addressed to Robert Eugene Smith, Esquire, 1409 Peachtree Street, N.E., Atlanta, Georgia 30309, Attorney for Petitioner.

This _____ day of _____, 197__.

LEONARD W. RHODES
Counsel for Respondent